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No. 88-1640

# In the Supreme Court of the United States

OCTOBER TERM, 1989

MICHIGAN CITIZENS FOR AN INDEPENDENT PRESS, ET AL., PETITIONERS

*v.*

DICK THORNBURGH, ATTORNEY GENERAL OF THE UNITED STATES, ET AL.

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

## BRIEF FOR THE FEDERAL RESPONDENT

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## QUESTION PRESENTED

Whether the Attorney General of the United States acted arbitrarily or capriciously in approving the application filed by the *Detroit Free Press* and *The Detroit News* for a joint newspaper operating arrangement under the Newspaper Preservation Act, 15 U.S.C. 1801 *et seq.*, after concluding that the *Free Press*, "regardless of its ownership or affiliations, is in probable danger of financial failure" (15 U.S.C. 1802(5)), and that approval of the application would further "the public interest of maintaining a newspaper press editorially and reportorially independent and competitive in all parts of the United States" (15 U.S.C. 1801).

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 166a-197a) is reported at 868 F.2d 1285; the opinions filed on denial of the petition for rehearing (Pet. App. 198a-211a) are reported at 868 F.2d 1300. The opinion of the district court (Pet. App. 149a-163a) is reported at 695 F. Supp. 1216. The decision of the Attorney General (Pet. App. 136a-147a) is unreported.

### JURISDICTION

The judgment of the court of appeals was entered on January 27, 1989. A petition for rehearing was denied on February 24, 1989 (Pet. App. 198a-199a). The petition for a writ of certiorari was filed on April 5, 1989, and was granted on May 1, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATUTORY PROVISIONS INVOLVED

Title 15, United States Code, Section 1801, provides:

> In the public interest of maintaining a newspaper press editorially and reportorially independent and competitive in all parts of the United States, it is hereby declared to be the public policy of the United States to preserve the publication of newspapers in any city, community, or metropolitan area where a joint operating arrangement has been heretofore entered into because of economic distress or is hereafter effected in accordance with the provisions of this chapter.

Title 15, United States Code, Section 1802, provides in pertinent part:

* * * * *

> (5) the term "failing newspaper" means a newspaper publication which, regardless of its ownership or affiliations, is in probable danger of financial failure.

Title 15, United States Code, Section 1803, provides in pertinent part:

* * * * *

> **(b) Written consent for future joint operating arrangements**
>
> It shall be unlawful for any person to enter into, perform, or enforce a joint operating arrangement, not already in effect, except with the prior written consent of the Attorney General of the United States. Prior to granting such approval, the Attorney General shall determine that not more than one of the newspaper publications involved in the arrangement is a publication other than a failing newspaper, and that approval of such arrangement would effectuate the policy and purpose of this chapter.



## STATEMENT

Petitioners, two citizen groups and six private individuals, filed this action against the Attorney General of the United States and two newspapers, the *Detroit Free Press* and *The Detroit News*, in the United States District Court for the District of Columbia. Petitioners challenged the Attorney General's approval of the joint operating arrangement between the *Free Press* and the *News* as violating the Newspaper Preservation Act, 15 U.S.C. 1801 *et seq.*, and the Administrative Procedure Act, 5 U.S.C. 706. On cross-motions for summary judgment, the district court upheld the Attorney General's decision. The court of appeals affirmed that judgment, finding that the Attorney General had properly applied the statutory framework to the facts presented.

### A. The Background and Statutory Scheme of the Newspaper Preservation Act

1. Over the last 80 years, metropolitan newspapers in the United States have failed at an alarming rate. As a result, a large majority of American communities are served today by a single local newspaper. See H.R. Rep. No. 1193, 91st Cong., 2d Sess. 3-4 (1970); E. Hynds, *American Newspapers in the 1980s* 139 (1980) ("By the late 1970s fewer than four percent of the nation's cities had competing newspapers.").

To combat this trend, endangered newspapers began in the 1930s to form "joint operating arrangements" (JOAs) with their competitors. Under the typical JOA, each newspaper reduces its costs by combining the business aspects of publishing, but retains its own editorial and news staffs and policies. H.R. Rep. No. 1193, *supra*, at 3-4. When these arrangements were challenged as unreasonable restraints of trade under the federal antitrust laws, the courts generally upheld the JOA under the "failing com-

pany" defense, a judicially-created doctrine that permits otherwise illegal business agreements to go forward when one of the firms involved is on the brink of collapse, its prospects for reorganization are dim or nonexistent, and no other noncompeting buyers are available. See, *e.g.*, *American Press Ass'n* v. *United States*, 245 F. 91, 93-94 (7th Cir. 1917); see also *International Shoe Co.* v. *FTC*, 280 U.S. 291, 299-303 (1930). As a consequence, the JOA mechanism saved a number of otherwise failing newspapers. By 1966, 22 such joint newspaper operating arrangements existed in the United States. H.R. Rep. No. 1193, *supra*, at 4-5.

2. In 1968, however, the Department of Justice, in an action filed in the District of Arizona, challenged the JOA between the two newspapers serving Tucson, Arizona, claiming that the arrangement constituted an illegal merger, in violation of Section 7 of the Clayton Act, 15 U.S.C. 18, as well as a restraint on trade and a monopoly, in violation of Sections 1 and 2 of the Sherman Act, 15 U.S.C. 1 and 2. The district court sustained the Department's challenge and declared the JOA illegal; the court accordingly ordered the newspapers to dismantle their joint operations and reestablish two separate and independent newspapers. *United States* v. *Citizen Publishing Co.*, 280 F. Supp. 978 (D. Ariz. 1968).

On direct appeal to this Court, the judgment was affirmed. *Citizen Publishing Co.* v. *United States*, 394 U.S. 131 (1969). This Court held that the Tucson JOA constituted an illegal merger under the Clayton Act, and involved prohibited price fixing, profit pooling, market allocation, and monopolization under the Sherman Act. In so holding, the Court strictly applied the "failing company" defense. 394 U.S. at 136-139. The Court found no evidence that the allegedly failing newspaper was considering liquidation, soliciting a purchaser, or grasping at the



JOA as a "last straw" (*id.* at 137). Furthermore, since the failing newspaper's competitor had been willing to join forces and split future profits, the newspaper could not be considered to be on "the brink of collapse," and thus could not qualify as a "failing" company (*id.* at 137-138).

3. In the meantime, Congress, in response to the district court's ruling, had convened hearings to determine the proper standard for allowing newspapers to enter into JOAs.[1] Within two months of the Court's decision in *Citizen Publishing*, Congress passed legislation to overturn that decision. See H.R. Rep. No. 1193, *supra*, at 10. On July 24, 1970, the President signed into law the Newspaper Preservation Act, 15 U.S.C. 1801 *et seq.*

In enacting the Newspaper Preservation Act, Congress recognized that unique economic forces affecting the newspaper industry make it difficult for two major newspapers to coexist in one metropolitan market. S. Rep. No. 535, 91st Cong., 1st Sess. 4 (1969). Specifically, Congress was aware of the interdependence of circulation and advertising revenue in the newspaper industry. Increases in circulation attract additional advertisers; loss of readership, on the other hand, pushes advertisers away—which, in turn, tends to cause further loss in circulation. As a result of this phenomenon, in a two-newspaper market a newspaper that takes a decisive lead over its rival in circulation and advertising will almost inevitably strengthen its competitive position. Conversely, readers and advertisers will invariably abandon a newspaper that falls markedly behind. Thus, a newspaper that loses a significant percentage of market share to its rival may become

[1] During the pendency of the case, the 90th and 91st Congresses heard testimony from 168 witnesses, amassed a 5200-page hearing record, and engaged in extensive floor debates that fill some 150 pages in the Congressional Record. See, *e.g.*, H.R. Rep. No. 1193, *supra*, at 6-7; Martel & Haydel, *Judicial Application of the Newspaper Preservation Act: Will Congressional Intent Be Relegated to the Back Pages*, 1984 B.Y.U. L. Rev. 123, 135.

trapped in a "downward spiral" of declining circulation and advertising that eventually leads to financial ruin.[2]

Congress determined that these unique economic factors, together with newspapers' vital role in society, called for specific federal action to preserve "[f]inancially strong newspapers independent of the commercial pressures which might inhibit their ability to take courageous and unpopular stands on public issues * * *." S. Rep. No. 535, *supra*, at 3. To accomplish this goal, Congress expressly permitted newspapers to enter into joint business operations before they reach the point of dire financial distress required by *Citizen Publishing*, provided they receive the prior approval of the Attorney General of the United States. See generally *Committee for an Independent P-I* v. *Hearst Corp.*, 704 F.2d 467, 473-474 (9th Cir.) (description of legislative history), cert. denied, 464 U.S. 892 (1983).

The Act broadly authorizes the Attorney General to approve a new JOA if not more than one of the newspaper applicants is other than a "failing newspaper," and approval of a JOA "would effectuate the policy and purpose of this [Act]." 15 U.S.C. 1803(b).[3] The Act defines "failing newspaper" as one that "regardless of its ownership or

[2] See, *e.g.*, 116 Cong. Rec. 1783 (1970) (statement of Sen. Hruska); *id.* at 1785 (statement of Sen. Inouye); *id.* at 1788 (statement of Sen. Bennett); see also Knox, *Antitrust Exemptions for Newspapers: An Economic Analysis*, 1971 Law & Soc. Order 3, 13-16 (describing the special economic characteristics of the newspaper industry); S. Oppenheim & C. Shields, *Newspapers and the Antitrust Laws* 5-6 (1981) (same).

[3] The Act further provides that a JOA entered into before July 24, 1970 (the effective date of the statute) may remain in effect "if at the time at which such arrangement was first entered into, * * * not more than one of the newspaper publications involved in the performance of such arrangement was likely to remain or become a financially sound publication * * *." 15 U.S.C. 1803(a).



affiliations, is in probable danger of financial failure." 15 U.S.C. 1802(5). Approval by the Attorney General confers only a limited exemption from federal antitrust laws. Newspapers entering into JOAs must maintain separate "editorial or reportorial staffs" and independent "editorial policies," 15 U.S.C. 1802(2), and may not engage in "any predatory pricing, any predatory practice, or any other conduct * * * which would be unlawful under any antitrust law if engaged in by a single entity," 15 U.S.C. 1803(c). The Act, however, does permit newspapers to take joint action with regard to printing, time and method of publication, production, advertising and circulation rates, distribution and solicitation, and revenue distribution. 15 U.S.C. 1802(2).

**B. The Administrative Proceedings Regarding the Application of the *Detroit Free Press* and *The Detroit News* for Approval of the Joint Operating Arrangement**

1. In May 1986, the *Detroit Free Press* and *The Detroit News* filed an application with the Attorney General for approval to operate under a JOA. That application identified the *Free Press* as a paper that was in probable danger of financial failure.[4] The proposed JOA provides that the *Free Press* will publish a weekday morning edition and the *News* will publish a separate weekday afternoon edition; one edition will be published on Saturday and Sunday, "with each paper assuming separate editorial and news responsibilities" (Pet. App. 115a (footnote omitted)). The two newspapers will maintain separate editorial and reportorial staffs, but will form a "partnership * * * which will control all business, commercial, and

[4] Knight-Ridder, Inc., owns the *Free Press*; Gannett Co. owns the *News*. Those firms are the country's two largest newspaper groups. Pet. App. 150a.

production aspects of publishing" each newspaper (*id.* at 116a).

In July 1986, the Assistant Attorney General for the Antitrust Division recommended against approval of the proposed JOA at that time, but also suggested that the Attorney General convene an administrative hearing "to resolve the material issues of fact raised by the Application" (J.A. 93).[5] The Attorney General accepted the recommendation, assigned the matter to an administrative law judge, and ordered the ALJ to conduct a hearing in order to develop the record in several specific areas.[6] The Attorney General designated the major relevant newspaper unions and the Mayor of Detroit as intervenors in the proceedings. The two newspapers and the Assistant Attorney General for the Antitrust Division joined them

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[5] Under the Justice Department's regulations, an application for a JOA will be referred first to the Assistant Attorney General for the Antitrust Division. That official may recommend approving or rejecting the application. Alternatively, he may recommend that a hearing be held before an administrative law judge. 28 C.F.R. 48.7. If the Attorney General so orders, an administrative law judge conducts a hearing, at which the applicants, the Assistant Attorney General for the Antitrust Division, and other persons who properly intervene become parties to the administrative proceedings. 28 C.F.R. 48.10(b), 48.11. After the hearing, the administrative law judge makes recommendations to the Attorney General, who then issues the final agency decision concerning the JOA application. 28 C.F.R. 48.13(b). The Attorney General may not delegate his decisionmaking responsibility to the Assistant Attorney General for the Antitrust Division or to any other employee of the Antitrust Division. 28 C.F.R. 48.2(a).

[6] The Attorney General directed the ALJ to examine seven issues: the relevance of economies of scale, the possible segmentation in the Detroit market, the effect of the Detroit economy's depressed state, the *Free Press*'s financial history, the cause of the *News*'s financial losses, the *Free Press*'s expenses, and the *Free Press*'s long-term prospects. Pet. App. 2a-3a.



as parties to the administrative hearing. Pet. App. 1a-3a, 150a-151a, 173a.[7]

2. The ALJ held a lengthy hearing and developed an extensive evidentiary record. The record shows that Detroit is the nation's fifth largest newspaper market, and that for almost three decades the *Free Press* and the *News* have competed fiercely to become the dominant paper (Pet. App. 15a, 119a, 139a). The competition escalated during the past 15 years; in 1976, for example, the *News* began publishing a morning edition in addition to its afternoon edition, thus challenging the *Free Press* head on. In order to gain an advantage in this direct competition, each newspaper invested millions of dollars in new printing facilities at a time when the Detroit metropolitan area was suffering an economic recession. Pet. App. 16a-18a.

This administrative record further indicates that the two papers competed strenuously not only to increase profits, but also to avoid the "irreversible downward spiral" that has claimed many "second" newspapers in metropolitan areas. Pet. App. 19a, 120a. Both papers sought to increase circulation and advertising in order to become the securely positioned "dominant paper" (*id.* at 139a). In part because this vigorous competition for readers and advertisers occurred during a period of economic recession in Detroit, the newspapers continued to charge comparatively low circulation and advertising prices. As a result, each paper suffered sizeable and persistent operating losses throughout the 1980s. The *Free Press*'s losses, however, were greater. Between 1979 and 1986, the *Free Press* sustained

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[7] The Mayor and the unions originally opposed the JOA. After the *Free Press* management announced in January 1988 that it would be forced to close the newspaper if the JOA application were denied, they withdrew that opposition. See J.A. 126-139.

increasing operating losses amounting in total to $81 million, and consistently trailed the *News* "in most circulation, revenue and [advertising] linage measures" (Pet. App. 140a). Indeed, in 1986, the *News* generated $61 million more in advertising revenue than did the *Free Press*. The *Free Press* also lost money from adopting market stategies aimed at improving its market position over the long term. Pet. App. 17a-19a, 139a-141a.

The administrative record also shows that, unlike the circumstances surrounding past JOA applications, the *Free Press* has not yet fallen into a "downward spiral" toward inevitable failure (Pet. App. 138a). Instead, the *Free Press* and the *News* are trapped in a stalemate—each paper shares the market, but each consistently sustains substantial losses in an effort to maintain its market share (with the *Free Press* bearing the brunt of those losses). Both newspapers could become profitable if they together raised prices and eliminated discounting. The antitrust laws, however, bar independent competitors, including newspapers, from taking such concerted action to raise their prices. Pet. App. 140a, 145a. Moreover, each paper reasonably fears that raising its prices unilaterally would shift readers and advertisers to the opposition. *Id.* at 87a-88a, 90a n.182; but see *id.* at 95a-98a. The record in fact confirms that in the Detroit market a small unilateral increase in price can cause an immediate and sizeable decrease in circulation. J.A. 202, 584; Exh. IX 198-Z8. In sum, the record shows that since neither paper can raise its prices without regard to the conduct of the other, neither one is in a position to take unilateral action to become profitable. Pet. App. 141a.

3. In December 1987, the ALJ recommended against approving the JOA, concluding that the newspapers had failed to prove that "losses * * * are traceable to an irreversible market condition which will probably lead to



domination and the downward spiral" (Pet. App. 129a). The ALJ noted the current stalemate, the precarious financial condition of the *Free Press,* the testimony of Alvah Chapman, the Chairman of Knight-Ridder, that he would recommend closing the *Free Press* if the JOA were denied, and the testimony of various Gannett officials that if the JOA were denied, the company would not jeopardize its circulation and advertising advantage by unilaterally raising prices at the *News*. The ALJ decided, nevertheless, that this evidence did not establish an irreversible trend towards market dominance by one of the newspapers. *Id.* at 130a-131a. In his view, "[i]t remains to be seen whether without a JOA these interdependent firms will modify their competitive strategies" (*id.* at 132a). Under those circumstances, he recommended that the "free market itself" should be permitted to take its course (*ibid.*).

4. On August 8, 1988, the Attorney General, having "accepted as accurate the fact findings of the Administrative Law Judge, but differ[ing] for the reasons stated with his ultimate conclusion as to where those facts lead" (Pet. App. 147a), approved the JOA. At the outset, the Attorney General expressly noted the "two overarching policy objectives" of the Newspaper Preservation Act: "[T]he more general pro-competitive objective of the antitrust laws, and the specific objective of preserving editorially and reportorially independent and competitive newspapers" (Pet. App. 144a (internal quotation marks and citation omitted)). He further explained that "Congress recognized that neither of these purposes is advanced when a single newspaper obtains a monopoly in any given market" (*id.* at 144a-145a).

The Attorney General recognized that to qualify for a JOA, at least one of the two newspapers had to be a "failing newspaper," which the statute defines as being in

"probable danger of financial failure." Pet. App. 140a-141a. Following his predecessor's decision,[8] the Attorney General stated that this statutory standard "must be addressed as a matter of probabilities, not certainties" (*id.* at 141a (internal quotation marks and citation omitted)). And, agreeing with *Committee for an Independent P-I* v. *Hearst Corp.*, 704 F.2d 467, 474 (9th Cir.), cert. denied, 464 U.S. 892 (1983), the only court of appeals decision construing the Newspaper Preservation Act, the Attorney General made clear that although the "danger of financial failure" standard is less stringent than the "failing company" standard of *Citizen Publishing,* it is more exacting than the "not likely to remain or become financially sound" standard rejected by Congress during consideration of the Act. Pet. App. 142a.

The Attorney General recognized that the *Free Press* was sustaining mounting losses. Pet. App. 141a. Although acknowledging the absence of a " 'downward spiral,' " the Attorney General found that "it is unquestionably the case that the *Free Press* is locked into a loss situation involving millions of dollars each year for the foreseeable future, with no realistic prospect of extricating itself" (*id.* at 142a). "[W]ere it not for a major infusion of millions of dollars by its parent," the Attorney General stated, "there

[8] See Opinion and Order Regarding Application of Seattle Times Co. and Hearst Corp. for Approval of Joint Operating Arrangement, 47 Fed. Reg. 26,472, 26,473 (1982) (Attorney General William French Smith).

The Attorney General also noted the formulation used in *Committee For An Independent P-I* v. *Hearst Corp.*, 704 F.2d at 478, where the court of appeals upheld Attorney General Smith's approval of the Seattle JOA: " '[t]he probable danger standard is, by the plain meaning of the words, primarily an economic standard: Is the newspaper suffering losses which more than likely cannot be reversed?' " (Pet. App. 142a (brackets in original)).



is every reason to assume that the *Free Press* would have failed long ago" (*id.* at 142a-143a).

Turning to the contention that both papers could become profitable simply by raising prices, the Attorney General noted first that the *Free Press* was already the more expensive paper in both circulation and advertising prices. Pet. App. 143a. The Attorney General explained that the two newspapers could become profitable only by a concerted price raise that, without the JOA, would be "entirely improper" (*id.* at 145a). He then observed that the owners of the *News* had testified that the newspaper would not raise its prices without joint action with the *Free Press*. Although the ALJ had questioned this testimony by Gannett officials, the Attorney General found that it "hardly reflects unsound business judgment" (*id.*at 143a). To the contrary, it would be reasonable for the *News* to hold to its current pricing strategy in order to maintain its circulation and advertising advantages over the *Free Press* (*id.* at 143a-144a, 147a).

The Attorney General also noted the testimony of the Chairman of Knight-Ridder (the firm that owns the *Free Press*) that he would recommend closing the newspaper if the JOA were denied. Although declining to attach "undue weight" to this testimony, the Attorney General recognized that it was a "prediction [that] cannot be wholly disregarded" (Pet. App. 144a). Since the *Free Press* had no unilateral means to extricate itself from its current loss position, the Attorney General determined that it "would be neither counterintuitive nor contradictory" for Knight-Ridder to close the *Free Press* (*ibid.*).[9]

[9] The Attorney General observed that after the ALJ had issued his recommendation, Knight-Ridder had submitted information confirming that the company would close the *Free Press* if the JOA were not approved. Because this information was submitted after the record was closed, the Attorney General did not consider it. See J.A. 150 n.4 (this footnote was mistakenly omitted from the reprint of the Attorney General's opinion in the appendix to the petition for a writ of certiorari).

The Attorney General accordingly found that the *Free Press* had no reasonable prospect of emerging from its position of intractable losses, and that, absent the intervention of the JOA, Detroit would soon have only one editorial voice. Pet. App. 142a, 145a-146a. On this record, the Attorney General determined that "the danger of financial failure, if not imminent, certainly seems 'probable' " (*id.* at 141a), and thus concluded that the *Free Press* qualified as a "failing newspaper" (*id.* at 144a).

The Attorney General then turned to the question whether approval of the JOA would effectuate the policy and purpose of the Act. In that inquiry, he specifically considered whether the newspapers should be denied permission to work under the JOA because they "openly pursued the JOA option over several years and saw it as a means of avoiding financial failure" (Pet. App. 145a). He found that the marketing strategy adopted by the newspapers had been in place for nearly ten years, and that Knight-Ridder's heavy investment in the *Free Press* during that period "belies the notion that it was principally pursuing any end other than market domination" (*id.* at 146a). Furthermore, the Attorney General accepted the ALJ's finding that the *Free Press*'s situation has not resulted from "improper marketing practices or culpable mismanagement" (*id.* at 145a). The Attorney General thus determined that the current stalemated loss position was the result of "[k]een competition aimed at market domination and future profitability—competition waged energetically but both responsibly and properly" (*ibid.*), and not the result of an improper quest for the safe harbor of a JOA.

Finally, the Attorney General concluded that the purposes of the Act would be served by approving the JOA because two independent editorial voices would be preserved in Detroit, "an outcome that does not appear to



be in the future otherwise" (Pet. App. 146a). Having determined that, on the record presented, the *Free Press* and the *News* had satisfied the statutory criteria, the Attorney General approved the application for the JOA.

### C. The Decisions of the District Court and the Court of Appeals Upholding the Attorney General's Approval of the Joint Operating Arrangement

1. After the Attorney General rendered his decision, petitioners, who had not participated in the proceedings before the ALJ or the Attorney General, filed this action in the United States District Court for the District of Columbia, seeking judicial review of the Attorney General's decision under the Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.* As a threshold matter, the district court held that the Attorney General's approval of the JOA must be reviewed under the "arbitrary and capricious standard" set forth in the APA (Pet. App. 153a). Under that standard of review, the court upheld the Attorney General's ruling that a newspaper need not show "the traditional downward spiral" in order to qualify as a "failing newspaper" under the Act (*id.* at 155a). Similarly, the court concluded that the Attorney General had "presented ample support * * * for his finding that the Free Press is both 'suffering losses which more than likely cannot be reversed' and is in 'probable danger of financial failure' " (*id.* at 156a).

The district court rejected petitioners' contentions that the Attorney General erred in concluding that the *News* would not raise its prices unilaterally if the JOA were denied, and that the Attorney General gave undue weight to testimony that the Chief Executive Officer of Knight-Ridder would recommend closing the *Free Press* under such circumstances. The court concluded that, on this

record, the Attorney General acted neither arbitrarily nor capriciously in determining that closing of the *Free Press* would be a logical course of action, given its substantial losses and market position. Pet. App. 157a-159a.

The court next turned to petitioners' argument that the newspapers' allegedly purposeful losses should have disqualified them from entering into a JOA. The court accepted the premise of petitioners' claim, but found that the losses in this case were primarily the result of each newspaper's independently seeking a secure, dominant position in the Detroit market (Pet. App. 159a-161a). The record showed that the prospect of a JOA at most played only a secondary role in the *Free Press*'s strategic decision-making. As the court stated, "[i]ndeed, [the facts found by the ALJ] suggest that the newspapers may have followed the same strategies had the JOA not been available" (*id.* at 161a). The court thus determined that the Attorney General had acted reasonably in refusing to disqualify the newspapers when the "losses are *primarily* the result of acceptable, competitive strategies, and are only marginally prompted by the prospect of a JOA should the strategies fail" (*id.* at 160a-161a).

Finally, the district court found no merit in petitioners' claim that the Attorney General's decision was internally inconsistent, holding that there can be no such conflict where the Attorney General had accepted only the ALJ's findings of fact, but not the inferences drawn from such facts (Pet. App. 161a-162a).

2. A divided panel of the court of appeals affirmed (Pet. App. 166a-197a). The court first determined that the meaning of the statutory standard "probable danger of financial failure" is "not apparent from the statute or the legislative history" (*id.* at 178a). The court thus decided that it should defer to the Attorney General's reasonable reading of that language, which had been taken from the



Ninth Circuit's self-described "commonsense construction" in *Committee for an Independent P-I* v. *Hearst Corp.*, *supra,* namely, "[i]s the newspaper suffering losses which more than likely cannot be reversed?" (704 F.2d at 478; see Pet. App. 175a, 178a-180a). The court acknowledged the "interpretive canon [of statutory construction] that exemptions to antitrust laws—like all exemptions—should be construed narrowly" (*id.* at 180a). But the court concluded that this aid to statutory construction should not be used to overturn a reasonable agency application of the Act to a particular set of facts (*id.* at 180a-181a).

The court of appeals then examined the Attorney General's decision and found it reasonable on the record presented. It accordingly upheld the Attorney General's conclusions that the *News* had achieved a competitive advantage, that the *News* would not likely ease competitive pressure on the *Free Press* by raising prices in the future if the JOA were denied, and that there was a significant probability that the *Free Press* would close in the absence of a JOA. Pet. App. 183a-189a. As the court stated, the Attorney General "obviously was concerned that if he gambled on the ALJ's prediction that both newspaper[s] were bluffing, Detroit would lose a newspaper" (*id.* at 187a).

Lastly, the court of appeals concluded that the Attorney General had sufficiently considered the potential problem that concerned the ALJ: that "[n]ewspapers in two newspaper towns will compete recklessly because of a recognition that the loser will be assured a soft landing" in the form of an approved JOA (Pet. App. 189a). In the court's view, the Attorney General reasonably concluded that the present financial distress of the newspapers was the result of a long history of fierce competition, and that the prospect of a future JOA was neither an initial nor a

principal motivating factor.[10] Thus, the court held that the Attorney General had acted reasonably in finding that market success was the principal goal of each newspaper, and that the approval of the JOA was therefore within the purposes of the Act. Pet. App. 189a-190a.[11]

The court of appeals later denied a petition for rehearing and suggestion for rehearing en banc (Pet. App. 198a-199a).[12]

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[10] The court noted that the Attorney General had recognized that it would be impossible to preclude competing newspapers from factoring the prospect of a JOA into their business strategies (Pet. App. 189a). The court made clear, however, that there was no need to "consider the hypothetical situation where the initial and principal motivating factor behind a price war is the prospect of a future JOA * * * [since the Attorney General reasonably concluded] that this record did not present such a situation" (*id.* at 190a n.13).

[11] Judge Ruth Bader Ginsburg dissented (Pet. App. 191a-197a), concluding that the matter should be remanded to the Attorney General for further explanation of the different standards governing approval of new and existing JOAs, and to address more precisely whether the two newspapers could actually become profitable on their own without the aid of a JOA.

[12] Chief Judge Wald and Judges Mikva, Edwards, and Ruth Bader Ginsburg dissented (Pet. App. 198a-199a). Chief Judge Wald, joined by Judges Mikva and Edwards, took issue with the Attorney General's conclusion concerning the likelihood that the *News* would unilaterally raise its prices if a JOA were denied (thereby allowing the *Free Press* to do the same) (*id.* at 205a-211a). According to the dissent, the Attorney General's conclusion was contrary to "[c]lassic economic principles" (*id.* at 207a), and continued low pricing by the *News* would be "perilously close" to prohibited predatory pricing (*id.* at 209a). The dissent therefore favored "perusal by an *en banc* court" (*ibid.*).

After rehearing was denied, petitioners filed an application for a stay of the Attorney General's decision pending the filing and disposition of a petition for a writ of certiorari. On March 3, 1989, the Chief Justice, sitting as Circuit Justice, denied the application for a stay. The next day, petitioners resubmitted the application to Justice Brennan, who granted a stay pending a further order by him or the Court. On March 20, the Court denied the application for a stay; Justices Blackmun and Stevens dissented. The *Free Press* and the *News* nevertheless determined that they would not immediately close the JOA



## SUMMARY OF ARGUMENT

I. The Newspaper Preservation Act, 15 U.S.C. 1801 *et seq.*, by its terms establishes the framework guiding the Attorney General's consideration of an application for a joint operating arrangement. That framework requires the Attorney General to make two independent determinations: first, that at least one of the newspaper applicants is a "failing newspaper" (15 U.S.C. 1803(b)), which the Act specifically defines as "a newspaper publication which, regardless of its ownership or affiliations, is in probable danger of financial failure" (15 U.S.C. 1802(5)); and second, that approval of the application "would effectuate the policy and purpose of [the Act]" (15 U.S.C. 1803(b)).

A. The first statutory criterion is "primarily an economic standard: Is the newspaper suffering losses which more than likely cannot be reversed?" *Committee For An Independent P-I* v. *Hearst Corp.*, 704 F.2d 467, 478 (9th Cir.), cert. denied, 464 U.S. 892 (1983). That standard does not require the Attorney General to consider additional non-economic policy factors such as whether granting a JOA would reward conduct contrary to the purpose of the Act or whether approval of the JOA would create a "roadmap" for other newspapers to follow. To the extent such non-economic policy factors inform the Attorney General's decision, Congress intended those factors to be taken into account at the second stage of the inquiry, namely, where the Attorney General determines whether approval of the application "would effectuate the policy and purpose" of the Act (15 U.S.C. 1803(b)).

B. Apart from the statutory prerequisite of a "failing newspaper," the Act calls for the Attorney General to make the discretionary and fact specific judgment whether approving a particular application for a JOA would further the "policy and purpose" of the Act. Specifically, the second statutory directive requires the Attorney General to

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transaction. On May 1, this Court granted the petition for a writ of certiorari.

determine whether the proposed arrangement would further "the public interest of maintaining a newspaper press editorially and reportorially independent and competitive" (15 U.S.C. 1801). Thus, he must not only weigh whether the JOA would preserve an independent source of news and commentary in the affected newspaper market; he must also consider the consequences of the JOA, such as its effect on otherwise open competition in that market.

II. A. Petitioners do not dispute the narrow scope of review applicable to the Attorney General's decisionmaking under the Newspaper Preservation Act—the "arbitrary and capricious" standard under the Administrative Procedure Act, 5 U.S.C. 706(2)(A). Under that standard, a reviewing court may not substitute its judgment for that of the congressionally designated decisionmaker; the court must determine only whether, within the statutory framework, there is a "rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n* v. *State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). This limited standard of review requires that the Attorney General's considered decision to approve the application for the JOA be sustained. On the record presented, petitioners have offered no sound basis for this Court to depart from its established practice of accepting the concurrent assessments of an administrative record by two lower courts. See *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 491 (1951).

B. There can be no serious doubt that the Attorney General applied the proper statutory standard to determine whether the *Free Press* is a "failing newspaper" under the Newspaper Preservation Act. In applying this primarily economic standard, the Attorney General recognized that he must not only examine whether current management could stave off financial failure, but also whether there is a "probable danger of financial failure" even with a new management team.



Nor can it be credibly maintained that the Attorney General acted arbitrarily and capriciously in finding that the *Free Press* was in probable danger of financial failure. He found that "the *Free Press* is locked into a loss situation involving millions of dollars each year for the foreseeable future, with no realistic prospect of extricating itself" (Pet. App. 142a). The Attorney General noted that the *Free Press* could become profitable if the *News* raised its prices. But since both newspapers were determined to maintain their market share, the owners of the *News*, without the protection of a JOA with the *Free Press*, would rationally refuse to raise prices (an action which would jeopardize the paper's competitive advantage in circulation and advertising revenue). The Attorney General also considered whether a change in management could prevent the *Free Press*'s probable financial collapse. He found, however, that "given the market reality in Detroit under present circumstances," the best any management team could accomplish would be to "forestall the financial failure of the [*Free Press*], not prevent it altogether" (*id.* at 144a). Fully recognizing that the *Free Press* has no reasonable prospect of emerging from its position of incurring intractable substantial losses, the Attorney General properly determined that the newspaper satisfied the "failing newspaper" standard of the Act.

C. The second statutory directive, which petitioners do not seriously dispute, requires the Attorney General to weigh whether the JOA would preserve independent and competitive editorial voices in the affected newspaper market. Again, no serious claim can be made that the Attorney General acted in an arbitrary and capricious manner in determining, on the record presented, that the JOA between the *Free Press* and the *News* "would effectuate the policy and purpose" of the Newspaper Preservation Act.

Given that the *Free Press* is a "failing newspaper," and that the *Free Press*'s losses cannot be reversed except by an unlawful collaborative price increase with the *News*, the Attorney General reasonably concluded that "approval of the JOA will plainly further the legislative purpose of preserving editorial voices in Detroit—an outcome that does not appear to be in the future otherwise" (Pet. App. 146a). The Attorney General also expressly considered whether the business strategies or practices of the *Free Press* and the *News* should preclude approval of the JOA. Recognizing that a JOA should not be approved where the prospect of that safe harbor accounts for the newspaper's demise, the Attorney General explained that the *Free Press* was not brought to the "brink of financial failure through improper marketing practices or mismanagement," but rather by "[k]een competition aimed at market domination and future profitability" (*id.* at 145a). Furthermore, the prospect of obtaining a JOA has not fueled the newspapers' fierce competition. The Attorney General thus determined that neither the *Free Press* nor the *News* had adopted improper business strategies or practices that would call for rejecting their otherwise meritorious application for a JOA.

D. Petitioners, grasping at the fact that the *Free Press* lowered its prices while competing with the *News*, challenge the Attorney General's decision as inconsistent with the policy and purpose of the Act. However, petitioners' belated focus on this element of the record fails for several reasons.

First, the Attorney General expressly found that the price competition between the *Free Press* and the *News*, although fierce, was entirely legitimate and not the result of maneuvering to qualify for a JOA in the future. Second, contrary to petitioners' suggestion, the Attorney General's decision scarcely resembles a "roadmap" for



newspapers to follow to obtain JOAs by lowering their prices in order artificially to create losses and a competitive stalemate. Finally, petitioners' attack on the *Free Press*'s decision to cut prices flies in the face of Congress's assessment of the economic factors governing the newspaper industry.

III. A. Contrary to petitioners' broad contention, the court of appeals' decision upholding the Attorney General's approval of the JOA does not misapply the principles of *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Although the court of appeals discussed the application of the *Chevron* doctrine to this case, on consideration we do not believe that any *Chevron* issue is presented. In this case, the Attorney General simply set forth the terms of the Newspaper Preservation Act, noted with approval the common-sense interpretation given by the Ninth Circuit in *Hearst*, and then proceeded to apply the Act to the particular setting surrounding the Detroit newspaper market. In these circumstances, there has been no controverted interpretation of a statute by an administrative agency that calls for application of the *Chevron* framework.

B. Even if an issue regarding the proper interpretation of the Act were presented here, the Attorney General's sound construction of the statute, which was adopted from the Ninth Circuit's decision in *Hearst*, should be upheld. Petitioners suggest that a court should not defer to the Attorney General's decision because he "has no technical expertise in interpreting [the Newspaper Preservation Act]" (Br. 38). However, since the Attorney General merely adopted the construction initially offered by a court, that issue is not presented. In any event, as the court of appeals correctly recognized, *Chevron* is not based solely on agency expertise (Pet. App. 182a). As that decision makes clear, the doctrine of deference is also

based on the established principle that the political branches of the government should make policy choices. See 467 U.S. at 865-866.

Finally, petitioners claim that the court of appeals erroneously upheld the Attorney General's decision without first requiring him to explain that he had applied the recognized canon of statutory construction that exceptions to antitrust laws must be narrowly construed. That claim is irrelevant here; as even petitioners concede, the Attorney General "never indicated that he intended to reject [the canon], or that he believed he would have had the authority to do so" (Br. 30).

## ARGUMENT

### THE ATTORNEY GENERAL'S APPROVAL OF THE APPLICATION FILED BY THE *DETROIT FREE PRESS* AND *THE DETROIT NEWS* FOR A JOINT OPERATING ARRANGEMENT IS FULLY CONSISTENT WITH THE STATUTORY REQUIREMENTS OF THE NEWSPAPER PRESERVATION ACT

#### I. The Newspaper Preservation Act Authorizes The Attorney General To Approve An Application For A Joint Operating Arrangement If At Least One Of The Newspaper Applicants Is A "Failing Newspaper" And Approval Of The Application Would "Effectuate The Policy And Purpose" Of The Act

The Newspaper Preservation Act, 15 U.S.C. 1801 *et seq.*, by its terms establishes the framework guiding the Attorney General's consideration of an application for a joint operating arrangement. That framework requires the Attorney General to make two independent determinations: first, that at least one of the newspaper applicants is a "failing newspaper" (15 U.S.C. 1803(b)), which the Act specifically defines as "a newspaper publication which, regardless of its ownership or affiliations, is in probable danger of financial failure" (15 U.S.C. 1802(5)); and second, that approval of the application "would effectuate



the policy and purpose of [the Act]" (15 U.S.C. 1803(b)). At each stage of the lengthy proceedings in this case, the reviewing authority has recognized this statutory standard and expressly applied it to the application filed by the *Detroit Free Press* and *The Detroit News*.[13] Despite their scattershot attack on the Attorney General's approval of the JOA, petitioners' challenge boils down to a disagreement over the application of the established statutory standard to actions of the two newspapers and the particular facts of the Detroit newspaper market.

A. 1. The Act expressly defines a "failing newspaper" as one "which, regardless of its ownership or affiliations, is in probable danger of financial failure" (15 U.S.C. 1802(5)). As the Ninth Circuit has correctly observed, "[t]he probable danger standard is, by the plain meaning of its words, primarily an economic standard: Is the newspaper suffering losses which more than likely cannot be reversed?" *Committee For An Independent P-I* v. *Hearst Corp.*, 704 F.2d at 478. That standard, however, does not limit the Attorney General's focus to the so-called "bottom line" of a newspaper's financial statements. In addition, the Attorney General must scrutinize the performance of existing management in order to determine whether new ownership or management, without resorting to a JOA, could convert the newspaper into a profitable enterprise. In other words, in weighing whether a newspaper is failing, the Attorney General must not merely examine whether current management could stave off financial failure, but also whether there is a "probable danger of financial failure" even with a new management team. See *Hearst*, 704 F.2d at 478-479 & n.10.

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[13] See Pet. App. 119a (administrative law judge); *id.* at 136a-137a (Attorney General); *id.* at 152a-153a (district court); *id.* at 168a-169a (court of appeals).

2. Petitioners do not seriously dispute this straightforward definition of the "failing newspaper" standard of the Act. Petitioners do appear to suggest (Br. 25-28) that the Attorney General must interpret that standard to include *additional* non-economic policy factors, such as whether granting a JOA would reward conduct contrary to the purpose of the Act or whether approval of the JOA would create a "roadmap" for other newspapers to follow (Br. 25). This suggestion, however, is inappropriate for two reasons.

First, any attempt to engraft additional elements onto the "failing newspaper" standard (as opposed to providing content to the second statutory requirement under 15 U.S.C. 1803(b)) ignores the fact that Congress, after debating several possible standards, specifically defined the term "failing newspaper" as a newspaper in "probable danger of financial failure." Indeed, petitioners themselves, in recounting the pertinent legislative history (Br. 16-19), concede that Congress wrestled with the question of an appropriate standard and ultimately adopted a definition of failing newspaper less stringent than that used by this Court in *Citizens Publishing,* but more exacting than other proposed standards. Where Congress has specifically considered alternative definitions and has settled on a statutory definition solely in economic terms, it would be inappropriate for a court to impose other, non-economic factors onto that definition.[14]

[14] Petitioners suggest in passing (Br. 19-20) that the "failure" standard embodied in the Bank Merger Act, 12 U.S.C. 1828(c)(5)(B), which this Court construed in *United States* v. *Third National Bank*, 390 U.S. 171 (1968), should be the benchmark for the Newspaper Preservation Act's "probable danger of financial failure" standard. To be sure, as petitioners point out (Br. 19), Congress did refer to the Bank Merger Act and *Third National Bank* in the legislative history of the Newspaper Preservation Act. The failing newspaper standard ultimately enacted into law, however, is quite different from the bank merger standard. Under the terms of the Newspaper Preservation Act, the Attorney General must undertake two separate inquiries; first, the economic determination of whether the newspaper is in probable danger of financial failure; and second, the discretionary policy judgment of whether the joint operating arrangement will effectuate the policy and purpose of the Act. In contrast, the Bank Merger Act requires a balancing of the anticompetitive effects of the proposed merger against the particular needs of the affected community. Under the latter statutory scheme, if there is sufficient "public interest," a bank merger could be approved even if neither of the merging banks is failing. See 12 U.S.C. 1828(c)(5)(B). Indeed, the "probable failure" language in the Bank Merger Act relates only to whether the agency can waive certain notice and waiting periods. 12 U.S.C. 1828(c)(3), (4) and (6). Accordingly, as commentators have observed, "the fact that Congress provided for exemptions to the antitrust laws in two different industries does not imply the same test should be applied * * * particularly when neither the industries nor the standards articulated by the Acts bear the slightest resemblance to each other." Martel & Haydel, *Judicial Application of the Newspaper Preservation Act: Will Congressional Intent Be Relegated to the Back Pages,* 1984 B.Y.U. L. Rev. 123, 164.

In any event, the issue petitioners appear to raise is not presented by this case. Petitioners themselves acknowledge (Br. 19-20) that the Antitrust Division has referred to *Third National Bank* in ruling on JOAs (see, *e.g.*, J.A. 146-147), that the ALJ did so in this case (Pet. App. 125a-126a), and that the Ninth Circuit considered that standard in *Hearst,* 704 F.2d at 476. Here, the Attorney General specifically agreed with and followed *Hearst,* and thus took into account *Third National Bank*. Pet. App. 142a. Moreover, to the extent that "[t]he *Third National Bank* standard required [the] Attorney General * * * to look behind the losses that the Free Press had suffered and to consider whether the losses were caused by mismanagement and whether there were reasonable alternatives to the JOA that could avoid the necessity of joint operation" (Pet. Br. 20), the record shows quite clearly that the Attorney General did so. See Pet. App. 142a-146a.



Second, to the extent that such non-economic policy factors inform the Attorney General's decision, Congress clearly intended these factors to be taken into account at

the second stage of the inquiry, namely, where the Attorney General determines whether approval of the application "would effectuate the policy and purpose" of the Act (15 U.S.C. 1803(b)). We fully agree with petitioners that the Attorney General must not "reward" newspapers that purposefully suffer substantial losses over the short term in order to obtain a potentially lucrative JOA in the long term. This factor, however, is appropriately considered by the Attorney General at the second stage of the statutory determination, *after* he has concluded that at least one of the newspaper applicants is in probable danger of financial failure.

B. Apart from the statutory prerequisite of one or more "failing newspapers," the Newspaper Preservation Act calls for the Attorney General to conclude that approval of the application for a joint operating arrangement "would effectuate the policy and purpose of [the Act]" (15 U.S.C. 1803(b)). Under 15 U.S.C. 1801, entitled "Congressional declaration of policy," Congress stated broadly that, in the interest of maintaining an independent and competitive press, it is the public policy of the United States to preserve newspapers in "economic distress" by allowing joint operating arrangements "in accordance with the provisions of this [Act]." This second inquiry under the Act thus calls for the Attorney General to take into account a number of policy factors, including whether approving a JOA would further "the public interest of maintaining a newspaper press editorially and reportorially independent and competitive in all parts of the United States" (15 U.S.C. 1801).[15]

[15] Petitioners suggest (Br. 38) that the Attorney General's inquiry at the second stage is mechanical, because the Act expressly defines its "policy" in 15 U.S.C. 1801. But the broad declaration of policy contained in Section 1801 hardly lends itself to any such perfunctory application. Moreover, petitioners themselves recognize (Br. 25-28) that certain factors not enumerated in the statute, such as whether approval of the JOA would create a "roadmap" for future newspapers to follow, should be taken into account before the Attorney General approves a JOA.



Given this broad statutory mandate, Congress deliberately vested one governmental official, the Attorney General, with the responsibility of undertaking the discretionary and fact specific judgment of whether approving a particular application for a JOA would further the goals of the Act. Accordingly, the statutory directive requires the Attorney General, in passing on an application for a JOA, to undertake a careful policy determination. He must not only weigh whether the JOA would preserve an independent source of news and commentary in the affected newspaper market; he must also consider the consequences of the JOA, such as its effect on otherwise open competition in that market.

## II. The Attorney General, Applying The Statutory Standards For Approval Of A JOA, Properly Determined That The *Detroit Free Press* Is A Failing Newspaper And That The Proposed JOA "Would Effectuate The Policy And Purpose" Of The Newspaper Preservation Act

A. In enacting the Newspaper Preservation Act, Congress did not include a provision for judicial review of the Attorney General's decision either to approve or disapprove an application for a JOA. See S. Rep. No. 535, *supra,* at 7. As a result, judicial review of that decision is available only under the Administrative Procedure Act. As both the district court and court of appeals correctly concluded, since the Newspaper Preservation Act itself does not require a hearing, the "substantial evidence" test does not apply. 5 U.S.C. 706(2)(E); *United States* v. *Florida East Coast Ry.*, 410 U.S. 224 (1973); see Pet.

App. 153a, 176a-177a & n.6. Accordingly, as the lower courts held, the Attorney General's decision is subject only to review under the "arbitrary and capricious" standard, 5 U.S.C. 706(2)(A). Pet. App. 153a, 176a-177a & n.6.

The arbitrary and capricious standard is especially appropriate where, as here, the decisionmaker must weigh competing statutory commands in making his policy determination. Under that standard, the challenged decision must be upheld unless it conflicts with the statute itself or is arbitrary and irrational. 5 U.S.C. 706(2)(A). In other words, a reviewing court may not substitute its judgment for that of the congressionally designated decisionmaker; the court must determine only whether, within the statutory framework, there is a "rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n* v. *State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). And the decision must be upheld if it " 'was based on a consideration of the relevant factors and [does not amount to] a clear error of judgment * * *.' " *Bowman Transp., Inc.* v. *Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 285 (1974) (quoting *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 416 (1971)).

Moreover, this Court has long held that the responsibility for assessing a record to determine whether an agency's decision is reasonable lies primarily with the lower courts. See, *e.g.*, *Mobil Oil Corp.* v. *FPC*, 417 U.S. 283, 310 (1974); *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 491 (1951). Thus, in *Universal Camera* the Court made clear that it "will intervene only in what ought to be the rare instance when the [substantial evidence] standard appears to have been misapprehended or grossly misapplied" (340 U.S. at 491). That prudential principle should apply a fortiori to instances where both the district court and the court of appeals concur in sustaining the agency's decision



under the more deferential arbitrary and capricious standard. On the record presented, petitioners have offered no sound basis for this Court to depart from its practice of accepting the concurrent assessments of an administrative record by two lower courts.

B. 1. There can be no serious doubt that the Attorney General applied the proper statutory standard to determine whether the *Free Press* is a "failing newspaper" under the Newspaper Preservation Act. Not only did the Attorney General explicitly cite and apply the specific statutory language that the newspaper must be "in 'probable danger of financial failure' " (Pet. App. 140a-141a, quoting 15 U.S.C. 1802(5)), he also agreed with the formulation adopted by the Ninth Circuit in *Hearst*, 704 F.2d at 478 (Pet. App. 142a). Accordingly, in applying this primarily economic standard, the Attorney General recognized that, in weighing whether a newspaper is failing, he must examine not only whether current management could stave off financial failure, but also whether there is a "probable danger of financial failure" even with a new management team. See *Hearst*, 704 F.2d at 478-479 n.10; Pet. App. 142a-144a.[16]

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[16] Petitioners take pains to point out that the "probable danger of financial failure" standard is stricter than the "[un]likely to remain or become a financially sound publication" standard rejected by Congress. See Br. 16-19. Petitioners' observation, although entirely accurate, is beside the point precisely because it has never been a matter of dispute. Indeed, the Attorney General expressly agreed with that proposition and, following the statutory language, applied the more stringent test, namely, requiring the newspapers to show that the failure of the *Free Press* is "probable". See Pet. App. 142a, 144a.

To the extent petitioners implicitly criticize the Attorney General for not explaining the difference between the "probable danger of financial failure standard" that governs a new JOA application and the less stringent "[un]likely to remain or become a financially sound" standard that governs an application to continue an existing JOA (15

2. Nor can it be credibly maintained that the Attorney General acted arbitrarily and capriciously in finding that the *Free Press* was in probable danger of financial failure. Pet. App. 141a, 143a, 147a. The Attorney General found that "the *Free Press* is locked into a loss situation involving millions of dollars each year for the foreseeable future, with no realistic prospect of extricating itself" (Pet. App. 142a). Although a concerted price increase could save the *Free Press,* the Attorney General recognized that the *Free Press* actually has no means to "reverse the unbroken pattern of annual operating losses" (*id.* at 145a), because a collaborative price raise with the *News* would be illegal without the JOA.

Similarly, the Attorney General noted that the *Free Press* could become profitable if the *News* itself raised prices. Based on the record testimony,[17] however, the Attorney General determined that since both newspapers were determined to preserve their respective market shares, the owners of the *News,* without the protection of a JOA with the *Free Press,* would rationally refuse to raise prices (an action which would jeopardize the paper's competitive advantage in circulation and advertising revenue). Pet. App. 143a-144a, 147a; see *id.* at 187a. Indeed, a unilateral price increase would drive down the newspaper's circulation and profits since the Detroit newspaper market is unusually price sensitive, See J.A. 202, 307-308, 584; Exh. IX 198-Z8.

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U.S.C. 1803(a)), that charge is irrelevant. This case involved an application for a new JOA. On this record, therefore, the Attorney General had no occasion to issue an advisory opinion regarding the standards applicable for continuation of an existing JOA.

[17] See, *e.g.*, J.A. 238-239 (testimony of Alen Neuarth, the Chief Executive Officer of Gannett); J.A. 347 (testimony of Robert Nelson, a Gannett official).



Finally, the Attorney General considered whether a change in management could prevent the *Free Press*'s probable financial collapse. But not even petitioners have suggested that the *Free Press* could fare better with different management. Indeed, the Attorney General specifically found that, given "the market reality in Detroit under present circumstances," the best any management team could accomplish would be to "forestall the financial failure of the [*Free Press*], not prevent it altogether" (Pet. App. 144a).

In sum, the Attorney General correctly found that the facts surrounding the Detroit newspaper market paint a vivid picture of a newspaper, the *Free Press,* whose demise "is not just speculative, or likely, but indeed 'probable' " (Pet. App. 144a).[18] The Attorney General recognized that the *Free Press* has no reasonable prospect of emerging

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[18] Petitioners contend (Br. 23) that since the proposed JOA contains a "50/50 profit split" between the two newspapers, that fact alone is "persuasive evidence" that the *Free Press* is not "in probable danger of financial failure." That assertion ignores both the facts of this case and the governing legal standard. First, the parties' agreement to share profits reflected their recognition that the *Free Press*'s corporate parent, Knight-Ridder, had the financial resources and the competitive will to continue publishing the *Free Press*, and thus effectively to force the *News* to sustain its own losses. See J.A. 228-229, 421, 443, 444. Second, petitioners' argument hearkens back to the analysis used in *Citizen Publishing Co.* v. *United States*, 394 U.S. 131, 137-138 (1969). In that decision, the Court stated that since a competitor's willingness to enter into an agreement that splits future profits shows that the newspaper is not on "the brink of collapse," that newspaper does not qualify as a "failing company." In enacting the Newspaper Preservation Act, however, Congress specifically jettisoned the *Citizen Publishing* approach. See, *e.g.*, S. Rep. No. 535, 91st Cong., 1st Sess. 4-5 (1969); H.R. Rep. No. 1193, 91st Cong., 2d Sess. 3 (1970). Even petitioners' recitation of the pertinent legislative history concedes as much. See Br. 15-16. Accordingly, petitioners' attempt to resurrect the approach rejected by Congress must fail.

from its current position of intractable and substantial losses. He thus properly determined that the newspaper satisfied the "failing newspaper" standard of the Act.

C. 1. The Newspaper Preservation Act also calls for the Attorney General, before approving an application for a joint operating arrangement, to make the discretionary and fact-specific judgment of whether the particular application "would effectuate the policy and purpose of [the Act]" (15 U.S.C. 1803(b)). Before this Court, petitioners do not seriously dispute the content of this inquiry. See Br. 18-19, 25-28. Indeed, petitioners do not expressly disagree with the Attorney General's description of the statutory standard:

> Undergirding the Act are two overarching policy objectives: the more general pro-competitive objective of the antitrust laws, and the specific objective of preserving "editorially and reportorially independent and competitive" newspapers (15 U.S.C. 1801). Congress recognized that neither of these purposes is advanced when a single newspaper obtains a monopoly in any given market. The alternative of a JOA is in the nature of a legislative trade-off: an incremental elimination of competition as to the newspapers' production activities in exchange for the assurance that the existing array of editorial and reporting voices will remain fiercely competitive and independent.

Pet. App. 144a-145a.

2. Again, no serious claim can be made that the Attorney General acted in an arbitrary and capricious manner in determining, on the record presented, that the JOA between the *Free Press* and the *News* "would effectuate the policy and purpose" of the Newspaper Preservation Act. Given that the *Free Press* is a "failing newspaper," and that the *Free Press*'s losses cannot be reversed except by an



unlawful collaborative price increase with the *News*, the Attorney General reasonably concluded that "approval of the JOA will plainly further the legislative purpose of preserving editorial voices in Detroit—an outcome that does not appear to be in the future otherwise" (Pet. App. 146a); see *id.* at 145a.

In making this determination, the Attorney General expressly considered whether the business strategies or practices of the *Free Press* and the *News* should preclude approval of the JOA. He recognized (anticipating petitioners' concern (*e.g.*, Br. 25)) that a JOA should not be approved where the prospect of that safe harbor accounts for the newspaper's demise. Pet. App. 146a. He nevertheless declined to announce any sweeping rule to govern such a case, because this record "offers a much different picture" (*ibid.*).[19] The Attorney General explained that the *Free Press* was not brought to the "brink of financial failure through improper marketing practices or culpable mismanagement," but rather by "[k]een competition aimed at market domination and future profitability" (*id.* at 145a). Furthermore, the prospect of obtaining a JOA had not fueled the newspapers' fierce competition. The Attorney General stated that the competitive strategies followed by both newspapers for almost a decade and "the heavy expenditure of investment capital by Knight-Ridder [owner of the *Free Press*] over that period of time belie[ ] the notion" that the newspapers were pursuing any end other than a stable, dominant, profitable position in the Detroit market (*id.* at 146a).[20] And the Attorney General

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[19] The court of appeals agreed that the Attorney General reasonably concluded that this case does not present "the hypothetical situation where the initial and principal motivating factor behind a price war is the prospect of a future JOA" (Pet. App. 190a n.13). See also *id.* at 160a-161a.

[20] The record makes clear that the *Free Press* and the *News* have been intense rivals battling over the Detroit market for almost 30

specifically found that only when the *Free Press* and the *News* found themselves caught in a "no win" stalemate did they look to the JOA as an available option (*ibid.*).[21]

D. Petitioners, grasping at the fact that the *Free Press* lowered its prices while competing with the *News,* challenge the Attorney General's decision as inconsistent with the policy and purpose of the Newspaper Preservation Act. In particular, petitioners apparently assert (Br. 27) that, if the JOA had not been in the offing, the *Free Press* would not have cut prices as part of its effort to achieve market dominance. According to petitioners, since rational firms purportedly do not price below their competitors, the Attorney General's approval of the JOA where the failing newspaper lowered its prices amounts to a "reward or encourage[ment of] such behavior" inconsistent with the Act itself (Br. 27). Petitioners' belated focus on this element of the record, however, although couched in terms of a legal dispute, is nothing more than either a thinly veiled challenge to the factual findings made below, or an attack on the findings about the unique economic characteristics of the newspaper industry that motivated Congress to enact the Newspaper Preservation Act.

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years—rivals that have escalated the level of competition in the last 15 years. In 1976, for example, the *News* began publishing a morning edition in addition to its afternoon edition, thus tackling the *Free Press* head on. Once this direct competition began, both newspapers invested millions of dollars in new printing facilities in order to gain an advantage. These actions, in turn, spurred further heated competition for increased circulation. Pet. App. 15a-18a.

[21] As the Attorney General explained, the newspapers reasonably recognized that a JOA was an available option after realizing that they were in a competitive stalemate with market dominance "no longer within the grasp of either paper" (Pet. App. 146a). At that stage, there was nothing improper about considering a JOA, since newspapers "cannot be faulted for considering and acting upon an alternative that Congress has created" (*ibid.*).



1. As we have explained (see pp. 34-36, *supra*), the Attorney General expressly found that the competition between the *Free Press* and the *News,* although fierce, was entirely legitimate and not the result of maneuvering to qualify for a JOA in the future. See Pet. App. 145a-146a. Those factual findings are amply supported by the record. Cf. *United States* v. *Doe,* 465 U.S. 605, 614 (1984).

Moreover, contrary to petitioners' suggestion (Br. 25-26), the Attorney General's decision scarcely resembles a "roadmap" for newspapers to follow to obtain JOAs by encouraging papers to lower their prices in order artificially to create losses and a competitive stalemate. The Attorney General determined that the *Free Press* and the *News* had engaged in legitimate competition to achieve market dominance, not the consolation prize of a JOA, and that the newspapers considered the JOA as an alternative only *after* they became locked into a loss stalemate. Pet. App. 146a.[22] As the court of appeals correctly observed, this case does not involve the situation where the "initial and principal motivating factor behind a price war

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[22] Petitioners claim that the Attorney General found that the *Free Press* had no unilateral means of breaking the stalemate "as long as the News was willing to continue to incur heavy losses" (Br. 25). That claim misreads the Attorney General's decision. He specifically determined that the *Free Press* could become profitable only through a collusive or collaborative price raise—an action that would be entirely improper without a JOA (Pet. App. 143a, 145a). The record shows that a unilateral price increase by either the *Free Press* or the *News* could cause the newspaper to lose circulation to its rival, and perhaps even lose revenue. *Id.* at 87a-88a (the *News* did not follow the *Free Press's* 1979 price increase "because it fears loss of the circulation lead if the papers sold at the same price"); see *id.* at 90a n.182 ("it is clear that any additional unilateral price increases by either paper would mean the loss of some circulation which in turn may require still additional promotional expenses including perhaps discounts off the increased circulation price").

is the prospect of a future JOA" (*id.* at 190a n.13). For that reason alone, no rational newspaper could reasonably rely on the Attorney General's decision as a guarantee that he would approve a JOA after the paper intentionally pursued that goal.[23]

Furthermore, the setting of the Attorney General's decision—the Detroit newspaper market—has its own particular characteristics that are not likely to be replicated elsewhere. The circulation rates of both the *Free Press* and the *News* are apparently highly price sensitive. This factor may result in part from weak consumer loyalty to either paper—almost 40% of each newspaper's regular readership also reads the competition's paper on a regular basis. Pet. App. 35a, 89a, 103a n.238; J.A. 584.[24] In addition, the record shows that the *Free Press* and the *News* waged their battle for market dominance at a time when the Detroit economy was falling deeply into recession. While the newspapers were competing for market share, consumers therefore had less disposable income to spend and Detroit's businesses, in turn, were spending fewer dollars on advertising. Pet. App. 14a-18a. In these circumstances, reducing prices was in fact a rational means for the newspapers to increase circulation and attract more advertisers.

The record offers no basis for assuming that these peculiar circumstances exist in other cities. Accordingly,

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[23] Should a newspaper, motivated by the prospect of obtaining a JOA, deliberately cut its prices to generate short-term losses, approval of the application for a JOA presumably would not further the policy or purpose of the Newspaper Preservation Act.

[24] Such "duplicate" readers are apt to be more sensitive to price changes than "exclusive" readers. Testimony in the record suggests that a 25-cent per week price increase would cause the *Free Press* to lose almost 40% of its duplicate readers. See Exh. IX 198H-1981.



the assertion that newspapers in market areas without Detroit's particular characteristics either could duplicate the stalemate the *Free Press* and the *News* face or would be tempted to risk millions of dollars to try to do so, blinks reality.[25] To the extent petitioners' "roadmap" metaphor is even apt, the Attorney General's decision would not lead inevitably to a JOA, but much more probably to a dead end.

2. Petitioners' attack on the *Free Press*'s decision to cut prices also flies in the face of Congress's assessment of the economic factors governing the newspaper industry. Congress recognized that newspapers have engaged and will continue to engage in legitimate fierce competition of the sort that led to the *Free Press*'s financial woes. Congress accordingly determined that the unique economic factors of the newspaper industry require the safety net of a JOA in appropriate instances. See H.R. Rep. No. 1193, *supra,* at 3 (JOAs are necessary because "vigorous competition" has often resulted in newspapers' financial failure); S. Rep. No. 535, *supra,* at 3-4 ("Allowing newspapers in competitive financial difficulty to work out agreements with a healthy newspaper * * * will give the newspaper under competitive pressure the financial security and stability necessary for independent behavior.").

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[25] Indeed, we seriously doubt whether other newspapers could ever replicate the material factors supporting the Attorney General's decision to approve the JOA here, which include the following: the failing newspaper's sustained and mounting losses for a period of seven years (Pet. App. 141a); the rival newspaper's significant competitive advantage in circulation and advertising (*id.* at 141a-142a); the history of nearly 30 years of intense competition (*id.* at 15a); the relevant market that prevents the failing newspaper from becoming profitable by raising its prices (*id.* at 141a-142a); and legitimate fierce competition during an economic recession (*id.* at 18a).

"[T]he economic mainstay of the newspaper business," as this Court has noted, is not circulation, but advertising. *Times-Picayune Publishing Co.* v. *United States,* 345 U.S. 594, 604 (1953). In fact, 70 to 75% of the typical newspaper's revenue derives from advertising revenue; circulation revenues generally ranks even below revenue from classified advertisements. See S. Oppenheim & C. Shields, *Newspapers and the Antitrust Laws* 5 (1981).[26] As a result, newspaper publishers are primarily concerned with maintaining a profitable flow of advertising revenue. See *Knutson* v. *Daily Review, Inc.,* 383 F. Supp. 1346, 1362-1364 (N.D. Cal. 1974), modified, 401 F. Supp. 1374 (N.D. Cal. 1975), aff'd in part and rev'd in part, 548 F.2d 795 (9th Cir. 1976), cert. denied, 433 U.S. 910 (1977).

Moreover, given that circulation price affects the demand for newspapers and the number of papers sold, "an increase in the subscription price may ultimately reduce the publisher's profits." *Knutson,* 383 F. Supp. at 1363-1364.[27] Here, the *Free Press* and the *News*

[26] The administrative record in this case shows that advertising revenue accounts for 72% of the *Free Press*'s total revenues and 81% of the *News*'s total revenues. Pet. App. 58a.

[27] As explained in the *Knutson* decision, 383 F. Supp. at 1363:

> Circulation, and hence the newspaper's rate of penetration, may vary with the subscription price of the newspaper. Circulation generally will decrease after an increase in the subscription price unless the publisher or someone else reallocates his resources in order to influence or control such a result, for example, by increasing expenditures for the solicitation of new subscriptions or increasing the quality of the product. Assuming that such a reallocation cannot be profitably undertaken or that it is ineffective, circulation will decline when the subscription price increases and advertising demand will therefore decline resulting in a reduction of the advertising space carried by the newspaper. This reduction will make the newspaper less desirable to subscribers which in turn will decrease circulation and lead to a further loss of advertising demand.



reasonably feared that unilaterally raising their prices would adversely affect circulation, and thus decrease advertising revenue. Pet. App. 87a-88a, 90a n.182; J.A. 202, 307-308, 584; Exh. IX 198-Z8. On the other hand, a newspaper might quite reasonably lower its circulation price to drive up circulation, or lower advertising rates to attract new business, and thus increase advertising revenue and long-term profits. Such a strategy can be economically sound given the interrelationship between circulation and advertising revenue.

There is an additional compelling reason that may justify the newspaper's price cuts. While up and down swings are the usual fare in other businesses, for a newspaper even a small downturn can snowball into an irreversible slide ultimately leading to ruin:

> Once a paper loses circulation, advertisers are less likely to purchase space in the paper. Readers, in turn, are less likely to buy a paper short on advertising, so circulation drops even further. The result of this interrelationship is an apparently irreversible downward plunge that ends in business failure.

Pet. App. 171a.[28] This "downward spiral" syndrome has claimed literally hundreds of newspapers, with the result that most cities in the United States are served only by one newspaper.[29] Given this pattern endemic to the industry, it is economically rational for a publisher to try to avoid the downward spiral by entrenching his paper as the stable dominant newspaper in the city. This concern explains

[28] See S. Rep. No. 535, *supra,* at 4 ("the economics of the newspaper industry make it more likely for newspapers to fail when faced with competition than other businesses; * * * when a newspaper is failing it is harder to reverse the process and it is almost impossible to find an outside buyer").

[29] See E. Hynds, *supra,* at 139; S. Oppenheim & C. Shields, *supra,* at 6-7; Martel & Haydel, *supra,* 1984 B.Y.U. L. Rev. at 128-130.

precisely why the two Detroit newspapers were battling so fiercely. Pet. App. 19a; J.A. 212, 405, 510. By lowering prices, the *Free Press* sought to increase circulation and advertising in order to avoid becoming the junior newspaper susceptible to the downward slide. The paper was well aware of the recent failures of the junior newspapers in Baltimore, Washington, D.C., Buffalo, Cleveland, and Philadelphia, and was attempting to entrench its market position in order to avoid a similar fate. See, *e.g.*, Pet. App. 99a; J.A. 212.

In sum, the Attorney General properly determined that the fact that the *Free Press* lowered its prices as part of its fierce competition for market dominance should not preclude it from securing a JOA.

**III. Because The Attorney General Properly Applied The Statutory Framework Of The Newspaper Preservation Act To The Particular Facts Of The Detroit Market, No *Chevron* Issue Is Presented**

Petitioners broadly contend (Br. 29-39) that the court of appeals' decision misapplied the principles of *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), requiring courts to defer to an agency's reasonable interpretation of a statute Congress has entrusted it to administer. That argument is wide of the mark for several reasons.

A. Although it is true that the court of appeals discussed the application of the *Chevron* doctrine to this case, on consideration we do not believe that any *Chevron* issue is in fact presented. This Court's decision in *Chevron* sets forth a framework for judicial review of disputes concerning an agency's construction of the meaning of a statute that it is charged with administering. *Chevron*, 467 U.S. at 842-844; see, *e.g.*, *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 448 (1987). As we have shown above, however,



although petitioners quarrel with the Attorney General's decision, they do not object to any material interpretation of the Newspaper Preservation Act adopted by the Attorney General. Nor could they, for the Attorney General did not purport to adopt a new construction of the statute. He simply set forth the terms of the Act, noted with approval the common-sense interpretation given by the Ninth Circuit in *Hearst*, 704 F.2d at 478, and then proceeded to apply the Act to the particular situation in the Detroit newspaper market. In these circumstances, there has been no controverted interpretation of a statute by an administrative agency that calls for application of the *Chevron* framework.

B. Even if an issue regarding the proper interpretation of the Newspaper Preservation Act were presented here, the Attorney General's sound construction of the statute, which was adopted from the Ninth Circuit's decision in *Hearst*, should be upheld. Petitioners suggest that a court should not defer to the Attorney General's decision because he "has no technical expertise in interpreting [the Newspaper Preservation Act]" (Br. 38). Again, however, this issue is not presented, since the Attorney General merely adopted the construction initially offered by a court. In any event, as the court of appeals correctly recognized, *Chevron* is not based solely on agency expertise (Pet. App. 182a). As that decision makes clear, the doctrine of deference is also based on the established principle that the political branches of government, rather than the courts, should make policy choices. See 467 U.S. at 865-866. Congress may decide which agency or official within the Executive Branch should be responsible for implementing particular legislation and resolving conflicting policies within a statutory framework. If the Attorney General's decision "represents a reasonable accommoda-

tion of conflicting policies that were committed to [his] * * * care by statute, * * * [it should not be disturbed] unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned." *Id.* at 845; see Pet. App. 181a.

Here, Congress vested responsibility for ascertaining whether a newspaper is "failing" and certain policy determinations on the shoulders of the Attorney General—a Cabinet official who, with access to all the resources of the Department of Justice, is fully capable of discharging that duty. Consequently, there is no basis for petitioners' suggestion that this Court should try to second-guess Congress's considered decision and examine the designated administrative decisionmaker's credentials before accepting his reasonable decision.

Finally, petitioners err in claiming (Br. 29-33) that the court of appeals erroneously upheld the Attorney General's decision without first requiring him to explain that he had applied the recognized canon of statutory construction that exceptions to the antitrust laws must be narrowly construed. As petitioners concede, the Attorney General "never indicated that he intended to reject [the canon], or that he believed he would have had the authority to do so" (Br. 30). Indeed, the Attorney General explicitly adopted the reading of the Newspaper Preservation Act set forth by the Ninth Circuit in *Hearst,* 704 F.2d at 473, which specifically stated that courts and the Attorney General, in applying the Act, must be guided by the canon of construction governing application of the antitrust laws. See Pet. App. 141a-142a. In any event, as is the case with other canons of statutory construction, that maxim does not dictate the outcome of a particular application of a statute to the record presented. The court of appeals did not ignore the maxim; it only recognized that



this canon of construction did not compel the Attorney General to reach a different result.[30]

[30] As this Court has made clear, the first stage of the *Chevron* framework requires a reviewing court to determine "whether Congress has spoken directly to the precise question at issue." *Chevron,* 467 U.S. at 842. This question must be answered by "employing traditional tools of statutory construction." *Id.* at 842 n.9; see *NLRB* v. *United Food & Commercial Workers Union, Local 23,* 108 S. Ct. 413, 421 (1987). Thus, as the court of appeals here correctly recognized, courts should and often do use canons of construction as intrinsic aids at the first stage of the *Chevron* analysis, insofar as those canons assist in the process of discerning congressional intent. Pet. App. 180a-181a.

At the second stage of the *Chevron* framework, where a reviewing court determines whether the agency has adopted a reasonable interpretation of an otherwise ambiguous statute, we believe somewhat greater caution in relying on canons would be in order. As the court of appeals observed, "*Chevron* implicitly precludes courts picking and choosing among various canons of statutory construction to reject reasonable *agency* interpretations of ambiguous statutes" (Pet. App. 180a (emphasis in original)). However, since it is undisputed that the Attorney General applied the pertinent canon in construing the Newspaper Preservation Act, and both the district court and the court of appeals accepted his reasonable and uncontroverted interpretation, this case presents no occasion to address the role of canons of construction at the second stage of the *Chevron* framework.

## CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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* The Solicitor General is disqualified in this case.

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